82-984

NO. _____

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM 1982

H. R. GIBSON, SR. AND BELVA GIBSON,
Petitioners

VS.

FEDERAL TRADE COMMISSION,
Respondent

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

FIFTH CIRCUIT

PETITION

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QUESTIONS PRESENTED

1. Is it necessary to prove discrimination to show a violation of Robinson-Patman 2(c) (15 USC 13(c))?

2. Is the decision of the Fifth Circuit in this matter holding that discrimination need not be proved in a Robinson-Patman 2(c) violation in conflict with the decision of the United States Supreme Court in FTC vs. Henry Broch & Co., 363 US 166 (1960), and FTC vs. Henry Broch & Co., 368 US 360 (1962)?

3. Is the Opinion of the Fifth Circuit in this case holding that discrimination need not be proved in a Robinson-Patman 2(c) violation in conflict with the 1962 Fifth Circuit Opinion in Thomasville Chair vs. FTC, 306 F2d 541?

4. Can the provisions of Sec. 5 of the Administrative Procedure Act (5 USC 554(d)) prohibiting one who participates in investigative or prosecutive functions

from also participating in the adjudicative decision be waived, or are these prohibitions fundamental to fair trial by an Administrative Agency?

5. Alternately, was the Petitioners' 1977 failure to object to ALJ von Brand's continuing to adjudicate after he disclosed service as legal advisor to Commissioner MacIntyre during pre-complaint phases of this matter, a meaningful waiver, in view of the FTC,s consistent successfully maintained position that legal advisors are exempt from such prohibitions?

6. Alternately, was the FTC Denial of Petitioners' Request For Discovery as to ALJ von Brand's access to ex parte information a denial of due process?

7. Did services provided by H. R. Gibson, Sr. exempt the Barshell payment under the "services rendered" exception of Robinson-Patman 2(c)?

PARTIES

The Petitioners are 82 yr. old H. R. Gibson, Sr. and his wife Belva Gibson.

The Respondent is the Federal Trade Commission, which has been investigating, conducting discovery against, and trying the Petitioners for the past 15 years.

ABBREVIATIONS

ALJ - Administrative Law Judge.

APA - Administrative Procedure Act.

CX - Commission Exhibit.

FF - Finding of Fact by the Administrative Law Judge.

FTC - Federal Trade Commission.

ID - Initial Decision of ALJ Feb. 26, 1979.

The Commission - The Federal Trade Commission setting as an administrative body.

TR - The FTC transcript of about 8,000 pages.

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STATUTES

NO. _____

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PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICE OF SAID COURT:

Now come the Petitioners H. R. Gibson, Sr. and Belva Gibson in the above-styled and numbered cause asking this Court to issue a Writ of Certiorari to the United States Court of Appeals for the FIFTH CIRCUIT and for cause thereof show the Court as follows.

OPINIONS OF FIFTH CIRCUIT AND FTC

The Fifth Circuit Opinion is set forth in 682 F2d 554, Rehearing En Banc denied 688 F2d 840.

The Commission Opinion of April 30, 1980, is set forth in 95 FTC 721-746. The Commission's Amended Opinion of August 8, 1980, is set forth in 96 FTC 126-133. The Commission's Final Order of April 30, 1980, is set forth in 95 FTC 746-749 except as amended by Order of August 8, 1980 - 96 FTC 126-133.

The ALJ's Opinion is reported in 95 FTC 553-721 (2/26/79).

The FTC's Complaint is reported in 87 FTC 1389-1397 (2/25/75).

JURISDICTION

The Fifth Circuit Opinion in this case was dated and entered August 13, 1982. The Fifth Circuit Orders Denying Rehearing and Rehearing En Banc were dated and filed September 13, 1982.

STATUTES INVOLVED

Robinson-Patman 2(c) (15 USC 13(c)) reads as follows:

> (c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

The pertinent portion of Section 5 of the Administrative Procedure Act (5 USC 554(d)) reads as follows:

> An employee or agent engaged in the performance of investigative or prosecutive functions for an agency <u>may</u> <u>not</u>, in that or a factually related case, participate or advise in the decision - - - ."
>
> (emphases added)

STATEMENT OF FACTS

The FTC from 1967 to 1975 investigated the Petitioners in connection with possible violations of Robinson-Patman 2(c) [15 USC 13(c)] and Federal Trade Commission Act Section 5 [15 USC 45]. A formal complaint was filed on February 25, 1975, alleging violations in three counts. Count I alleged a violation of Section 5 of the FTC Act, i.e., the solicitation of discriminatory promotional allowances prohibited by Robinson-Patman 2(d) and (e) [15 USC 13(d) and (e)]. It was dismissed by both the ALJ and the Commission.

Count II alleged a boycott in violation of Section 5 of the FTC Act.

Count III alleged a violation of Robinson-Patman 2(c) (15 USC 13(c)) in that:

> 26. (a) In the course and conduct of their business, the Gibson family respondents and the Gibson corporate respondents have been or are now utilizing

the services of various manufacturers representatives and brokers such as respondents Progressive Brokerage, Inc., Barshell, Inc., and Al Cohen and Associates, Inc., to perform services for the Gibson family respondents and the Gibson corporate respondents by:

(1) Furnishing information concerning market conditions;

(2) Maintaining contact with various sellers;

(3) Inspecting and selecting specified qualities and quantities of sundry products; and

(4) Negotiating purchases of said products.

(b) Such manufacturers representatives and brokers, in performing the services enumerated above, have been or are now acting as agents or representatives of the Gibson family respondents and the Gibson corporate respondents. In such capacity, said manufacturers representatives and brokers, were or are subject to and under the direct or indirect control of the Gibson family respondents and the Gibson corporate respondents.

(c) In connection with such transactions, such

manufacturers representatives and brokers, including respondents Progressive Brokerage, Inc., Barshell, Inc., and Al Cohen and Associates, Inc., are now or have been collecting and receiving brokerage, commissions, or other compensations from sellers of sundry products, when in fact they have been or are now acting for or in behalf of the Gibson family respondents or Gibson corporate respondents or are subject to the direct or indirect control of said respondents.

27. The aforesaid acts and practices of said respondents, individually or in conjunction with each other, in receiving or accepting, or paying and granting, directly or indirectly, anything of value as commission, brokerage or other compensation, or any allowance or discount in lieu thereof from sellers, are in violation of Sub-Section (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. §13) and are all to the prejudice of the public and constitute unfair methods of competition in commerce and unfair acts and practices in or affecting commerce within the intent and meaning and in violation of §5 of the Federal Trade Commission Act, as amended (15 U.S.C. Section 45).

(FTC Complaint Feb. 25, 1975 - 87 FTC 1396-7)

After a ten month trial, ALJ Theodor P. von Brand filed an Initial Decision, February 26, 1979 (95 FTC 553-721) dismissing Count I as to both Mr. & Mrs. Gibson, and Count III as to Belva Gibson. An Order was issued under Counts II and III on H. R. Gibson, Sr. and under Count II on Belva Gibson.

Both the Petitioners and the FTC appealed to the Commission. The Commission on April 30, 1980 (95 FTC 721-746) reversed ALJ Theodor P. von Brand's dismissal of Count III as to Belva Gibson, and issued an Order substantially like that of Judge von Brand except that Belva Gibson was included in the Count III section (95 FTC 746-749).

The FTC tried Count III [Robinson-Patman 2(c)] without any attempt to prove discrimination.

The conviction of the Petitioners on Count III rests solely on proof of a single payment to Petitioner H. R. Gibson, Sr. on September 23, 1972 by Barshell, Inc. No

effort was made to tie this payment to any specific sale or any specific goods. The FTC relied entirely upon assertion that Robinson-Patman 2(c) flatly prohibits any payment by a seller's broker to a buyer. Petitioner H. R. Gibson, Sr. was found to be a buyer on the basis that until Nov. 1, 1972 he owned stock in six retail corporations.

The FTC made no effort to prove any other comparable sales by the same seller (Ray-O-Vac) to any retailer competing with H. R. Gibson, Sr. (and his wife Belva Gibson).

The position of the FTC that discrimination need not be proved in a Robinson-Patman 2(c) violation was upheld by the ALJ, the Commission, and the Fifth Circuit. The FTC cited the commercial bribery cases (Rangen[1] and Fitch[2]) as

1. Rangen Inc. vs. Sterling Nelson & Sons 351 F2d 851 (1965) 9th C.
2. Fitch vs. Kentucky-Tennessee Light & Power Co. 136 F2d 12 (1943) 6th C.

precedent that discrimination need not be proved. But the FTC made no effort to show that the case at bar involved commercial bribery.

H. R. Gibson, Sr. operated a trade show at which he promoted Barshell products. In other ways H. R. Gibson, Sr. promoted the sale of Barshell's products. The ALJ found that the Barshell check (CX-192) was based on sales and the activities Gibson performed to sell Ray-O-Vac products---" (FF 420; 95 FTC 667-668 - Appendix E, p.1).

The ALJ held that these services did not place the September 23, 1972 payment by Barshell within the "for services rendered" exception of Robinson-Patman 2(c). (95 FTC 694; Appendix E, p.7).

The Fifth Circuit Opinion erroneously states that the Barshell check was found by the FTC not to be related to Gibson's services, and did not rule on whether those services put the payment within the "services rendered" exception of Robinson-

Patman 2(c). (682 F2d 571; Appendix A, p.70). Instead, the Fifth Circuit affirmed the FTC's finding (95 FTC 742; Appendix B, pp. 80,81) that H. R. Gibson, Sr. had failed to carry his burden of proof as to the value of the selling services rendered by Gibson in relationship to the payment of the check. (682 F2d 571; Appendix A, p.70).

On Petition For Reconsideration filed June 6, 1980 (Appendix C) the Commission on August 8, 1980, slightly modified its Order (96 FTC 126-133; Appendix D). At the same time the Commission denied the Petition of Mr. & Mrs. Gibson to reverse, remand, and hold for naught the FTC Decision and Order because of Judge von Brand's service from 1963 to 1971 as legal advisor to FTC Commissioner Everette MacIntyre or alternately to allow discovery by taking a deposition of ALJ Theodor P. von Brand and obtaining the

records involving von Brand's association with this case and related cases involving Mr. & Mrs. Gibson from 1963 to 1971 (Appendix D; pp. 13-21). During 1967-1971 several matters involving the Petitioners were before the Commission, including subpoena enforcement.

The Petition For Reconsideration was based partly (Appendix C pp. 6-22) on the April 17, 1980, Decision (amended) of the Ninth Circuit in Grolier vs. FTC, 615 F2d 1215, which for the first time held that legal advisors to Commissioners were not exempt from the prohibitions of Section 5 of the APA:

> "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency may not, in that or a factually related case, participate or advise in the decision - - -. 5 USC 554(d)"
>
> (emphases added)

This language has been on the books since 1946. Prior to the Ninth Circuit

Grolier Decision, the FTC had consistently ruled that legal advisors were exempt from the foregoing prohibitions under language exempting Commissioners:

> "This subsection does not apply
> - - - - - - - - - - -
> (C) to the agency or a member or members of the body comprising the agency."
>
> 5 USC 554(d)

The basis given by the Commission for denial was that Mr. & Mrs. Gibson had waived their rights to insist on the enforcement of the prohibitions of 5 USC 554(d) on February 27, 1977, when Judge von Brand disclosed his service as legal advisor to FTC Commissioner Everette MacIntyre from 1963 to 1971 stating that he did not recall handling anything pertaining to H. R. Gibson, Sr. or Belva Gibson (Appendix D, pp. 13-21). This was twelve months after the FTC had ruled that Judge von Brand's service as legal advisor to Commissioner MacIntyre was exempt from

the prohibitions of 5 USC 554(d). Grolier, 87 FTC 179 (1976). The Fifth Circuit affirmed waiver (682 F2d 563)

The Court of Appeals for the Fifth Circuit reviewed the administrative decision of the FTC as provided by 15 USC 45(c).

ARGUMENT

1. Discrimination Is a Necessary Element of a Violation of Robinson-Patman 2(c) (In Other than Commercial Bribery Cases).

The Fifth Circuit states that it is not necessary to prove discrimination in regard to the single payment made by Barshell (a seller's broker) to H. R. Gibson, Sr. a buyer (682 F2d 570 - Appendix A, p. 66) and refers to this type of payment as a "per se" violation (682 F2d 572 - Appendix A, p. 74), affirming the findings of the FTC but failing to refer to (or distinguish) Thomasville Chair vs. FTC. 37 F2d 541(5th C.) 1962.

The Fifth Circuit distinguishes FTC vs. Broch, 363 US 166 (1960), on factual grounds but does not comment on the legal requirement of discrimination in a 2(c) case, and does not mention FTC vs. Broch, 368 US 360(1962).

The FTC offered no proof that the sole payment relied on by the FTC to show a

violation of Robinson-Patment 2(c) made by Barshell, Inc., a seller's broker, to H. R. Gibson, Sr. on September 23, 1972 was discriminatory, or that there was a competitor buying comparable products contemporaneously from the same seller who was discriminated against. No specific sale of any specific merchandise was ever identified. The FTC relied solely on its allegation that the payment by Barshell, Inc. (a seller's broker) to H. R. Gibson, Sr. (a buyer) is a "per se" violation of Robinson-Patman 2(c).

The violation of 2(c) is based on payment by a seller's broker to a buyer. While earlier cases refer to Robinson-Patman 2(c) (15 USC 13(c)) as a per se statute, later cases make it obvious that it is not. The Fifth Circuit in Thomasville Chair vs. FTC, 306 F2d 541 (1962) and this Court in FTC vs. Henry Broch, 363 US 166 (1960), hold that payment

to a buyer by the seller, even if there is a corresponding reduction in the commission of the seller's broker, does not constitute a per se violation of 2(c).

This Court embraces the concept that Robinson-Patman 2(c) is only concerned with discrimination:

> --whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case. FTC vs. Henry Broch (1960) 363 US 175-176.

This Court in Broch characterizes as "absurd" any suggestion that a seller's uniform reduction in commissions accompanied by a uniform reduction in price (no discrimination between buyers) is a violation of Robinson-Patman 2(c), and states that neither the legislative history nor the purpose of the act would require such a result. FTC vs. Henry Broch & Co. (1960) 363 US 176.

This Court in FTC vs. Henry Broch (1962) again embraces the idea that

discrimination is essential to 2(c) by referring to a uniform reduction in commissions (no discrimination between buyers) as "clearly lawful." 368 US 360, 367, Footnote 9.

The Fifth Circuit in Thomasville Chair vs. FTC, 306 F2d 541 (1962) in setting aside an FTC order (58 FTC 441) held that discrimination must be proved before there can be a violation of Robinson-Patman 2(c):

> --a reduction in price, giving effect to reduced commissions--are violations of Section 2(c) only if such reduction in price is discriminatory. 306 F2d 545.

Rohrer vs. Sears (E.D.Mich. 1975) 1975-1 T.C. §60,352 holds that Robinson-Patman 2(c) has the same requirements as 2(a). Therefore discrimination is a requisite.

The FTC ignores its own precedent set out in Modern Marketing Service Inc., 71 FTC 1676, 1685-86 (1967):

> The crucial question in every case brought under Section 2(c) is whether the buyer is receiving preferential treatment---

The FTC ignores its findings and pronouncements in two 1974 cases that "the only purpose of the statute [Robinson-Patman 2(c)] is to prevent price discrimination among customers of the same seller." In Re Food Fair Stores Inc. et al; and In Re H. C. Bohack Co. Inc., et al. 83 FTC 1213, 1228.

The FTC's holding that discrimination need not be proved in a Robinson-Patman 2(c) case is supported by the citation of two pre-Broch and pre-Thomasville cases, Webb-Crawford vs. FTC, (1940) 109 F2d 268, (Fifth Circuit), and Southgate Brokerage Co. vs. FTC, (1945) 150 F2d 607 (Fourth Circuit). These cases are abandoned as precedent in later decisions. See Empire Rayon vs. American Viscose, (1965) 354 F2d 182, 190, a dissent adopted by the majority

in a subsequent en banc rehearing. 364 F2d 491 (2nd C.) 1966.

The FTC further sought to establish that discrimination is not a necessary element by citing Fitch vs. Kentucky-Tennessee Light & Power Co., 136 F2d 12 (Sixth Circuit 1943) and Rangen, Inc. vs. Sterling Nelson & Sons, 351 F2d 851 (Ninth Circuit 1965).

Rangen and Fitch hold that Robinson-Patman 2(c) may also be used against commercial bribery in addition to the ordinary buyer discrimination cases.

In Calnetics Corporation vs. Volkswagen of America, Inc., 532 F2d 674 (1976), (a compilation of five separate cases), the Ninth Circuit, (author of the Rangen decision, supra), places both Rangen and Fitch in the proper perspective and cites this Court's 1960 Broch Decision as authority:

> Both Fitch, 136 F.2d at 15, and Rangen, 351 F2d at 856-58,

have held that §2(c)'s application is not limited to situations of price discrimination, but also encompasses commercial bribery. In Rangen this court held:

> "With regard to the legislative history, defendants cite excerpts which amply demonstrate that, in enacting section 2(c), the prime concern of Congress was to curtail price discriminations accomplished by pseudo-brokerage arrangements. The Supreme Court, in Federal Trade Comm'n v. Henry Broch & Co., 363 US 166, 169, 88 S.Ct. 1158, 4 L.Ed.2d 1124, noted this principal legislative concern."
>
> 532 F2d 696

2. The Fifth Circuit Opinion Holding that Discrimination Is Not a Requisite in a 2(c) Violation, Is in Conflict With FTC vs. Henry Broch & Co., 363 US 166 (1960), and FTC vs. Henry Broch & Co., 368 US 360 (1962).

In FTC vs. Henry Broch & Co., 363 US 166 (1960), this Court held that in each [2(c)] case facts must be developed to show whether payment of brokerage is "discriminatory." (363 US 175-176). The Court further characterizes as "absurd" any suggestion that a uniform reduction in commissions without a uniform reduction in price is a violation of 2(c) because there would be no discrimination between buyers. 363 US 176.

This Court in the 1962 decision in FTC vs. Henry Broch, 368 US 360 again adheres to the necessity for discrimination in a Robinson-Patman 2(c) violation stating that a uniform reduction in commission is "clearly lawful" (368 US 367) and repeating the 1960 Broch pronouncements on a violation without discrimination being an absurdity. (368 US 367, Footnote 9).

In the case at bar, the Fifth Circuit has held that discrimination is not a necessary element in a Robinson-Patman 2(c) violation. (682 F2d 570; Appendix A, p. 66). This conflicts with both the Broch cases.

3. The Fifth Circuit Opinion Holding That Discrimination Is Not a Necessary Element of Robinson Patman 2(c) is in conflict with its own Opinion in Thomasville Chair vs. FTC, 306 F2d 541 (1962).

In Thomasville Chair vs. FTC, 306 F2d 541 (1962), the Fifth Circuit held that discrimination is a necessary element in a Robinson-Patman 2(c) violation and that 2(c) is not per se (306 F2d 542, 545).

In the case at bar, the Fifth Circuit, without attempting to distinguish its Thomasville decision has held that discrimination is not an element and that 2(c) is "per se." (682 F2d 570, 572; Appendix A, pp. 66, 74).

Since these two Fifth Circuit decisions conflict, the Court should grant this Petition for a Writ of Certiorari.

4. The Prohibitions of the Administrative Procedure Act (5 USC 554(d) Are Fundamental and Cannot Be Waived.

Theodor P. von Brand prior to becoming an Administrative Law Judge served as the Chief Legal Advisor to Commissioner Everette MacIntyre, of the Federal Trade Commission during the years 1963-1971. During this period several matters pertaining to the Petitioners were considered and decided by the Commission, Commissioner MacIntyre participated. (Appendix C, pp. 9-16).

The Administration Procedure Act prohibits the practice of embodying in one person the duties of both prosecutor and judge. Such a practice is not conducive to fairness in the administrative process:

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency

review pursuant to Section 557 of this title---

5 USC 554(d)
(emphases added)

This Court in Wong Yang Sung vs. McGrath, (1949) 339 US 33, speaks to the general strictures of the Administrative Procedure Act regarding administrative law judges:

> ---they must be examiners whose independence and tenure are so guarded by the Act as to give the assurances of neutrality which Congress thought would guarantee the impartiality of the administrative process.

The mandatory prohibitions of those so-tainted [5 USC 554(d)] serving as hearing examiners (ALJ's) was precipitated by the public interest in fairness, i.e., the due process guaranteed by the 5th Amendment, and to insure the confidence of the public in the intrinsic fairness of the administrative system of justice. The APA was to protect the public interest by changing the practice of embodying in one

person the duties of prosecutor and judge. Wong Yang Sung vs. McGrath, 339 US 33, 41.

No one person may waive the public interest in constitutional provisions. The requirements of a statute enacted for the public good may not be nullified or varied by private contract or waiver, School District vs. Teachers' Retirement Fund Association, 95 P2d 720, 96 P2d 419; Grandview Inland Fruit Co. vs. Hartford Fidelity Insurance Co., 56 P2d 827.

The right of H. R. Gibson, Sr. and Belva Gibson to insist that Theodor P. von Brand is prohibited from serving as ALJ in the Gibson case is secondary to the public interest.

Because of this overriding public interest in the maintenance of certain minimal essential standards in all administrative proceedings, the mandates of 5 USC 554(d) are fundamental; thus the FTC proceeding is void, regardless of any waiver, and should be set aside.

5. Alternately, the 1977 Failure by Petitioners to Object to von Brand's Continued Service as ALJ Was Not a Meaningful Waiver.

The FTC maintains that these Petitioners waived their rights to object to von Brand's continued service as ALJ on February 27, 1977, following his disclosure that he had served as legal advisor to Commissioner Everette MacIntyre of the Federal Trade Commission from 1967 to 1971, and that he did not remember handling anything in connection with the Gibsons. (96 FTC 162-133; Appendix D, pp. 13-21).

Even if Petitioners waived their right in 1977 to request that Theodor P. von Brand disqualify himself under 5 USC 556(b) this did not constitute a waiver to protest the service of ALJ von Brand when prohibited by Law under the provisions of 5 USC 554(d) as subsequently interpreted by the Ninth Circuit in April 1980. (Grolier vs. FTC 615 F2d 1215, Ninth Circuit).

Since the passage of the Administrative Procedure Act in 1946, until Grolier vs. FTC, 615 F2d 1215 (April 17, 1980) Ninth Circuit, the law was that the legal advisor to a Commissioner of the Federal Trade Commission was exempt from the mandatory prohibitions of 5 USC 554(d) by the exemption set up therein for Commissioners. In Re Grolier 87 FTC 179(1976); 91 FTC 315, 485-486; In Re The Kroger Co., (Feb. 26, 1979), 93 FTC 302, 306.

In In Re Grolier, 87 FTC 179 (1976) the Commission in commenting on ALJ von Brand's previous service as legal advisor to Commissioner Everette MacIntyre, stated there was "no apparent impropriety in Judge von Brand's continued participation" in the adjudication of a case merely because he was legal advisor to Commissioner MacIntyre during the investigation (87 FTC 180) since von Brand is not "subject to

disqualification even if could be shown that he advised Commissioner MacIntyre on matters pertaining to these respondents" (87 FTC 181) (because he is exempt from the prohibitions of 5 USC 554(d)).

Where an objection to the agency would plainly be unavailing in the light of its [the Agency's] manifest opposition, or because it has already evinced its "special competence" in a manner hostile to petitioner, courts need not bow to primary jurisdiction of the administrative body. Board of Education vs. Patricia Harris (1979) 622 F2d 599, 607 (2nd Circuit).

Not until Grolier vs. FTC, 615 F2d 1215 (April 17, 1980), did it become clear that the prohibitions of 5 USC 554(d) applied to legal advisors to commissioners.

Therefore any 1977 "waiver" to ALJ von Brand's serving as ALJ because of prior service as legal advisor to Commissioner

Everette MacIntyre, was less than a meaningful waiver of any then-apparent right.

The first paper filed by the Petitioners following the Grolier decision (Petition For Reconsideration challenged the authority of ALJ von Brand under 5 USC 554(d). (Appendix C, pp. 6-22). Only after Grolier (April 17, 1980), was it clear the Administrative Procedure Act (5 USC 554(d)) flatly prohibited von Brand from serving in the capacity of fact finder and interpreter of the law during the Petitioners' many years before the FTC administrative system.

Therefore, the administrative trial should be set aside as void and the decision of the Fifth Circuit reversed and remanded with instructions to remand to the FTC.

6. Alternately, the Failure of the FTC to Allow Discovery to Determine If ALJ von Brand Was Sufficiently Involved With Pre-Complaint FTC Activities To Be Apprised of Ex Parte Information Denies Due Process.

Due to the non-public nature of the administrative processes of the Federal Trade Commission, there is no method by which these Petitioners can determine if ALJ Theodor P. von Brand had access to ex parte information other than through conducting discovery on the Federal Trade Commission itself. The Petitioners sought to do this in their Petition For Reconsideration filed June 6, 1980, (following the Ninth Circuit Opinion in Grolier vs. FTC, 615 F2d 1215) but the FTC denied such request for discovery. (Order of August 8, 1980; 96 FTC 126-133 - Appendix D, pp. 13-21).

This denial effectively deprived the Petitioners due process of law in that they could not determine the extent to which ALJ Theodor P. von Brand was involved in the

pre-complaint phases of this case. Grolier holds that whether the ALJ recalls ex parte information is not the issue, but that if he was sufficiently involved with the case to be apprised of ex parte information, then 5 USC 554(d) "requires his disqualification." 615 F2d 1221.

Petitioners have been deprived of their due process rights to discover whether ALJ von Brand was sufficiently involved with the FTC's pre-complaint activities to be apprised of ex parte information. On this basis, this Application for a Writ of Certiorari should be granted.

7. The Barshell Payment of September 23, 1972 is Exempt From the Provisions of Robinson-Patman 2(c) by Reason of the "Services Rendered" Exception.

ALJ von Brand held that the services rendered by H. R. Gibson, Sr. in selling and promoting the sale of Barshell's products were "in effect, rendered for himself," and thus not cognizable under the [services rendered] exception (95 FTC 692; Appendix E, p. 6) relying on a 1945 Fourth Circuit case, Southgate vs. FTC, 150 F2d 607. Southgate has been rejected as a precedent by later cases, Empire Rayon Yarn vs. American Viscose Corp., (1965) 354 F2d, 182, 190, a dissent adopted by an En Banc panel (2nd C., 1966) 364 F2d 491.

The ALJ also rejected the services rendered exception because H. R. Gibson, Sr. did not show that "distribution costs saved, justified the amount of the allowance," and did not establish "the value in concrete terms of the services rendered in relation to the Commission

payments received." (95 FTC 694; Appendix E p. 7).

However the FTC's own witness, James S. Miller (who earlier took a consent decree for his company Barshell) testified that Barshell payments to H. R. Gibson, Sr. depended on what Gibson had done for Barshell (TR 3133, Appendix H, p.1).

The Commission concedes that Gibson's services were selling type services:

> It is not contested that [Gibson's] services in inducing the purchase of Ray-O-Vac products by Gibson stores were in the nature of brokerage or "selling type" services within the exception in Section 2(c)."
> 95 FTC 742;
> Appendix B, p.80.

The Commission held that Gibson had not "met the burden" of proving the value of his services (95 FTC 742; Appendix B, p. 80) and veers off into a discussion of "functional discounts." (95 FTC 743; Appendix B, p.81-83).

In FTC vs. Henry Broch (1960) 363 U.S. 166, this Court recognizes the "...

services rendered" exception of Robinson-Patman 2(c) on payments to a buyer.

> "We would have quite a different case if there were such evidence [of the buyer rendering services to the seller]".
>
> 363 US 173

The Commission notes that FTC vs. Broch & Co., 363 US 166 (1960) recognizes that the "for services rendered" exception of Robinson-Patman 2(c) applies to this situation (95 FTC 742, Footnote 25; Appendix B, pp. 79, 80), but sidesteps the issue by claiming that Gibson Sr. failed to discharge his burden of proof. Gibson did prove that his selling services were worth what Barshell paid. There was never any evidence that the services were worth nothing. The FTC's witness, Miller, testified and indicated the value of the services were paid, not overpaid, to Gibson, Sr. A man employed for a sales job is paid what he earns. Gibson earned that payment and none of the witnesses disputed

that. Gibson was in effect a salesman for Barshell.

What the FTC (with the assistance of the Fifth Circuit) has done is to graft a new qualifier on the already excessive verbiage of 2(c) so that it reads "except for services rendered provided the services are worth the money or other thing of value that was paid for them." Gibson met his burden when he showed that the Barshell check was paid for the services he rendered Barshell. He thus came squarely under the exception to Robinson-Patman 2(c). The FTC and the Fifth Circuit cannot retroactively graft onto Robinson-Patman a new clause. That is for Congress.

The Fifth Circuit held that "the Commission found" that H. R. Gibson, Sr. "failed to provide adequate evidence to substantiate [his] claim "(services rendered) and that the ALJ and the Commission found that "the check in question had nothing to do with Gibson's

services but rather was a payment for brokerage (682 F2d 571; Appendix A, p. 70).

Contrary to that statement, the FTC did not find that the check (CX-197) had nothing to do with Gibson's services. Instead the ALJ found that the Barshell check (CX-192) was paid on the basis of Ray-O-Vac sales (FF 422, 95 FTC 668; Appendix E, p. 3) to Gibson and on sales and the activities Gibson performed to sell Ray-O-Vac products. (FF 420, 95 FTC 667-668; Appendix E, p. 1). See Miller testimony (TR-3132, Appendix H, p. 1).

The Commission in reviewing the ALJ's Opinion adopted the ALJ's findings thus conceding that CX-192 was for selling services rendered by Gibson but held that Gibson failed in proof - i.e., did not offer evidence to show that the services were worth what he was paid. (95 FTC 742,743; Appendix B, pp. 79-81).

Gibson has met his burden by showing that the check in question (CX-192) was for

"services rendered" and thus is exempt from the provisions of Robinson-Patman 2(c). Therefore, this Petition should be granted.

CONCLUSION

This Petition For Writ Of Certiorari should be granted because:

1. The Fifth Circuit has erroneously held that it is not necessary to show discrimination in a Robinson-Patman 2(c) case involving a payment by a seller's broker to a buyer in other than a commercial bribery case.

2. The Fifth Circuit Opinion herein is in conflict with the opinions of this Court in FTC vs. Henry Broch & Co., 363 US 166 (1960), and FTC vs. Henry Broch & Co., 368 US 360 (1962), holding that discrimination is a necessary part of a violation of Robinson-Patman 2(c).

3. The Fifth Circuit Opinion in holding that discrimination need not be proved in a Robinson-Patman 2(c) violation is in conflict with its own opinion in Thomasville Chair vs. FTC, 306 F2d 541 (1962).

4. The prohibition by the Administrative Procedure Act [5 USC 554(d)] providing that one who participates in prosecutorial functions "may not" participate or advise in the decision, is a fundamental guarantee of due process which cannot be waived.

5. Alternately, the 1977 "waiver" to object to ALJ von Brand's serving as the administrative trial judge after having served as legal advisor to Commissioner Everette MacIntyre of the Federal Trade Commission during a period, 1967-1971 (when the Commission considered and issued orders involving the Petitioners), was not a meaningful waiver of Petitioners' rights (as later interpreted by the Ninth Circuit in Grolier vs. FTC, 615 F2d 1215, April 17, 1980).

6. Alternately, the denial by the FTC of discovery as to the extent of ALJ von Brand's pre-complaint involvement in the

case and access to ex parte information is a denial of Petitioners due process rights.

7. H. R. Gibson's receipt of the single payment from Barshell is exempt from the provisions of Robinson-Patman 2(c) under the services rendered exception.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is certify that service has been had upon the Respondent of the foregoing Petition by depositing in the U. S. Mail, postage prepaid, three (3) copies each of said Petition addressed to the Solicitor General, U. S. Department of Justice, Washington, D.C., and to the Federal Trade Commission, Washington, D. C. All parties required to be served have been served, on this the 10th day of December, 1982.

Bardwell D. Odum
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